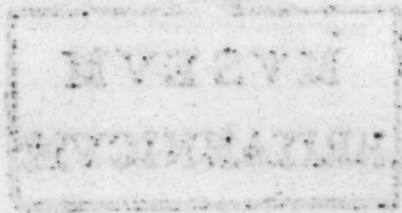


AN
ENQUIRY
INTO THE
QUESTION, &c.



1786

NOTICE

ENGINE

THE NEW METHOD
OF THE
GREAT BRITAIN

1786

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AN
ENQUIRY
INTO THE
QUESTION,

*Whether the Brother of the paternal Grand-mother shall
succeed to the Inheritance of the Son, in preference to the
Brother of the paternal Great-Grand-mother?*

The Affirmative having been advanced by
MR. JUSTICE MANWOODE;

Acceded to by

MR. JUSTICE HARPER, MR. JUSTICE MOUNSON,
AND THE LORD DYER;

And adopted by

LORD BACON, LORD HALE,

AND

THE LORD CHIEF-BARON GILBERT;

And the Negative maintained by

MR. ROBINSON,

(*The late Chief-Justice of Gibraltar,*)

AND

MR. JUSTICE BLACKSTONE:

BY CHARLES WATKINS, ESQ.

Of the Middle-Temple,

Author of an ESSAY on the LAW of DESCENTS, &c. &c.

LONDON:
PRINTED FOR J. BUTTERWORTH, FLEET-STREET.

1798.



AN
ENQUIRY, &c.

THE Question—Whether the brother of the paternal grandmother, or the brother of the paternal great-grandmother, shall first succeed to the inheritance of the son—having never received a legal determination ; or, at least, no report, or even intimation, of such legal determination being known as extant, the only mode of solution was, and, 'till an absolute decision by a court of law be obtained, must remain to be, that of deduction from established principles.

But though the general principles of our laws relative to Descents have been, for se-

veral centuries, settled and confessed, yet, on a subject of so much magnitude as that we are about to investigate,—a subject so abstruse in its nature, and connected with an almost antiquated erudition,—it cannot be matter of wonder that different principles should be assumed by different persons ; or—that different persons should vary from each other in their deductions, though the principles which they assumed were the same.

We are informed by *Plowden*, (a) in his Report of the Case of *Clere* and *Brook*, that Mr. Justice *Manwoode* affirmed that the brother of the purchaser's paternal grandmother, should be preferred to the brother of the purchaser's paternal great-grandmother ; and, in a note which is subjoined to his Report of that Case, he also tells us that he afterwards put the question to Mr. Justice *Manwoode*, in the presence of Mr. Justice *Harper*, and again, severally, to Mr. Justice

(a) *Comm.* 450.

Mounson and *Sir James Dyer*, and that they were all of opinion, that the brother of the grandmother should first take; though the Reporter has, at the same time, taken care to add that many were of a *contrary* opinion; namely, that the brother of the paternal great-grandmother ought to have been preferred.

The doctrine, however, of Mr. Justice *Manwoode*, has been adopted by *Lord Bacon*; (b) by *Sir Matthew Hale*; (c) and by the *Lord Chief Baron Gilbert*; (d) while the contrary position has been maintained by Mr. *Robinson*, (e) and Mr. Justice *Blackstone*. (f)

The arguments of the latter writer were, however, controverted by an anonymous

(b) *Elements*. I. p. 3. *Tracts*. 37. *Edit.* 1737.

(c) *Hist. Comm. Law*. 268, &c. *Edit.* 1779.

(d) *Ten.* 19.

(e) *Law of Inherit. in Fee Simple*. Ch. 6, &c.

(f) 2. *Comm.* 238. Ch. 14.

author, in a pamphlet, which appeared in the year 1779, entitled, "Remarks on the Laws of Descent; and on the Reasons assigned by Mr. Justice *Blackstone*, for rejecting, in his Table of Descent, a point of doctrine laid down in *Plowden*, Lord *Bacon*, and *Hale*." * In a note to a late edition of the Commentaries, Mr. Justice *Blackstone* was vindicated by Mr. Professor *Christian*; and Mr. Professor *Christian* has, in his turn, been charged with inconsistency in his defence; and the tenets, both of the author of the Commentaries and his annotator, have been again denied, by the same anonymous writer, in another pamphlet, which has recently made its appearance, under the title of "Remarks on the Inconsistency of the Table of Descents, projected by Mr. Professor *Christian*, in the twelfth edition of the Commentaries, with the doctrine laid down by Sir *William Blackstone*, and by every writer on the Law of Descents."

* This will be referred to as the "*First Pamphlet*."

When the author of these pages composed his *Essay on Descents*, he did not compose it with a view to publication, but merely to clear up, to himself, the doubts he then entertained relative to the points he has discussed in that little work ; and as, from the reasoning of Mr. Justice *Blackstone*, and the principles which appeared to the author to have been just, he entertained but little doubt as to the propriety of the doctrine maintained by the learned and elegant commentator on the Laws of England, he thought it needless to enter into a discussion of the question. Had he intended the *Essay on Descents* for the public eye, he would not have suffered the question to pass unnoticed.

In a note to his edition of the *Tenures* of the late *Chief-Baron Gilbert*, (g) the author has shortly given his sentiments on the subject ; but, as the question is again brought

(g) N. XVII. to p. 19. (e). p. 366.

before the public, he is induced to consider it more particularly, and to endeavour to furnish the student with *data* by which he may be the better enabled to form his opinion on this controverted and important point.

But, before an investigation of the subject be proceeded in, it may be proper to observe that the reader must not regard these pages as written merely in vindication of Mr. Justice *Blackstone* or in opposition to the author of the *Remarks*, but with a view to the solution of the abstract question. It will be a matter of indifference to the author of this tract, whether the former or the latter be right, when personally considered; but he is desirous of ascertaining *which of them* is so. And, although the principles assumed and the deductions which are drawn from them, can alone influence the question, yet the relative situation of those writers makes the discovery of the accurate or erroneous one of much importance; as an error in

the Commentaries, which are so universally consulted, would certainly be more extensively injurious than an error in the anonymous pamphlet of the day.

The general reputation acquired by an author, has frequently too much influence over the weaker or more indolent part of his readers ; though the name or reputation of an author cannot affect the truth or error of his doctrine. But an anonymous writer, it may be urged, must rest more immediately on the soundness of his tenets, and the accuracy of his conclusions ; and as an author who publishes anonymously must be supposed to have some reason for withholding his name, it does not, perhaps, become his readers to enquire after that which he has taken pains to conceal. Yet it should not be forgotten, that anonymous pamphlets often acquire an imaginary importance from being the reputed offspring of some elevated character ; and it may, therefore, be of moment to many to support the accuracy, or

detect the error, of pamphlets which have been so generally attributed to no less a person than the CHIEF JUSTICE OF CANADA.

We will, therefore, now proceed to enquire into the question, Whether the brother of the paternal grandmother, or the brother of the paternal great-grandmother, shall first succeed to the inheritance of the son ?

Now it is incontrovertibly laid down as law—That, in the case of a purchase, the paternal line shall always be preferred to the maternal;—and that the heirs on the part of the mother shall never succeed till those on the part of the father be exhausted. (*h*)—

—That the father has two immediate bloods in him; *viz.* the blood of his father and the blood of his mother. (*i*)—

(*b*) *Litt. S. 4: & Co. Litt. 12. a & b.*

(*i*) *Co. Litt. 12. a. & vide Remarks. (First Pamphlet.) 8.*

—That a person taking lands by purchase, in fee-simple, shall take them as a feud of indefinite antiquity. (*k*)

If the purchaser, therefore, die without issue, we are to seek for his heir among the issue of his father :—If none of those remain, we ask for those of his grandfather :—If none of those are to be found, we pursue our enquiries among the issue of his great-grandfather :—and so on, *ad infinitum*.—Or, according to Mr. Justice *Blackstone's* Table, the issue of Geoffrey and Lucy Stiles, (or the Classes, No. 4, &c.) shall first succeed ;—then the issue of George and Cecilia, (or the Class, No. 7) ;—then the issue of Walter and Christian, (or the Class, No. 8) ;—and then the issue of Richard and Anne, (or the Class, No. 9) ;—and we will suppose that we can trace the male paternal line of John Stiles, our purchaser, no further than to

(*k*) *Wright's Ten.* 17. 180. 2. *Bl. Comm.* 220. &c.

Richard, his paternal grandfather's paternal grandfather.

The Question, therefore, will now be, Who is the next heir of John Stiles?—The brother of Anne Godfrey, (the paternal grandfather's paternal grand-mother);—the issue of William and Jane Smith, (the brother of the paternal great-grandmother, (or the Class, No. 10);)—or the issue of Luke and Frances Kempe, (the brother of the paternal grand-mother, (or the Class, No. 11)?)

But, in order to come immediately to the Question which we at first intended to investigate, we will suppose our enquiries, as to the male paternal line, to end in George Stiles, the paternal grandfather, rather than in Walter Stiles, the paternal grandfather's father, or in Richard, the paternal grandfather's paternal grandfather.

Now we find, according to the position we have noticed, that George Stiles was

composed of the bloods both of his father and mother :—That of his father we suppose exhausted ; but that of his mother remains in the issue of William and Jane Smith, (or in the Class, No. 10). It appears, therefore, most evidently, from the authorities cited, that the blood of Walter is *not* exhausted ; and, consequently, that we must seek for his heir in his unexhausted blood, or in the issue of William and Jane Smith ; or in the Class, No. 10. Lord *Coke* says, expressly, that “ the father has *two* immediate bloods in him ;—the blood of his father and the blood of his mother. BOTH *these bloods are OF THE PART OF THE FATHER :—And BOTH these bloods of the part of his father MUST BE SPENT, before the heir of the blood of the part of the mother shall inherit.*” (l)—And it is acknowledged by Lord *Hale*, (m) that the collaterals of the father’s mother,—

(l) *Co. Litt.* 12. a & b.

(m) *Com. Law.* 271.

of the father's grandmother,—and of the father's great-grandmother, *are of* THE BLOOD OF THE FATHER.

If then the paternal great-grandmother be of the blood of the father, she must, of consequence, be of the blood of the paternal grandfather;—or of George Stiles;—and consequently, also, as the *paternal* line of George is supposed extinct, it should seem that the next heir must be found in his *maternal* blood, or in that of Christian Smith, or in the Class, No. 10.

Again :—As the feud is held *ut antiquum*, it is supposed to have *descended* to the purchaser from his ancestors; and, as the paternal blood is always preferred, to have descended to him *paternally*.—Now, if it had *actually* descended in the paternal line, (and an *actual* descent is, by the very terms, *presumed*,) (*n*) it may be considered as having

(*n*) And see *Wright*. 180. 2. *Bl. Comm.* 212.

been once actually vested in the purchaser's paternal ancestors; and, consequently, it may be supposed to have *actually* descended from the most remote. Now, if we suppose it to have actually descended from George Stiles;—that we can trace the paternal line no higher than George;—that the blood of George was composed of the bloods both of his father and mother;—and that his father's blood is exhausted;—the brother of his mother, (or the Class, No. 10), must certainly be the heir to the premises:—and the brother of Cecilia Kempe, (or the Class, No. 11), cannot possibly be entitled, while any of the former Class, (No. 10), be in existence.

If the *presumed* descent is *not* to be considered as an *actual* one, when compatible with the end of the presumption, there is no meaning in terms. As the law, therefore, presumes, that the feud descended *paternally*, such feud must be considered as having actually done so, while the consideration will answer the end for which such presumption

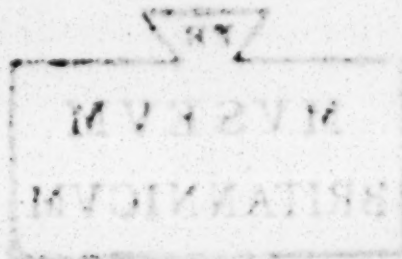


was adopted. If it will not answer that end, the presumption, as to its paternal descent, ceases; and the law will deem the feud to have descended *maternally*, rather than it should escheat to the lord of the fee.*—Hence it admits the heirs of the *mother* of the purchaser, when those of the father are no longer to be found.

As the heirs on the part of the father are to be preferred, or, in other terms, as the feud is presumed to have descended to the purchaser from his father, the law enquires (in case of the death of the purchaser without issue) for the heir of the father; as he who ought to inherit to the father, ought, pursuant to an ancient axiom, (*o*) to inherit also to the son; for, in the consideration of the present question, we have nothing to do with the half-blood.

* *Pasch.* 49. *Ed.* III. *pl.* 5. *fol.* 11. b. 12. a.

(*o*) *Mich.* 12. *Ed.* IV. *pl.* 12. *fol.* 14. a. & fee 2. *Bl. Comm.* 220. & 239. 240.



Now, if the feud be presumed to have descended to the purchaser from his father, and his father has left no issue, the next enquiry is, How did the father inherit it?—If he inherited it from *his mother*, it must be *so proved*; and if it be *not so proved*, it will be presumed to have descended to him *from his father*; as the presumption is in favour of the male line.

On the presumption that it descended from the grandfather, and that the grandfather has left no issue, the question will then be,—From whom did *he* inherit it? Here the presumption again returns,—That *he* inherited it from HIS FATHER, or Walter Stiles. But, according to our supposition, the male *paternal* line, or that of *Stiles*, can be no further traced than to George;—the law *then* will presume that the feud descended to George *maternally*, and, consequently, from Christian Smith; and, consequently, the next heir to the premises must be *her* brother, or the Class, No. 10.

Again :--As the antiquity of the feud is merely *presumed*, no particular ancestor can be absolutely precluded from being the stock of the descent. The first presumption, indeed, is that the feud had descended from the male ancestor; but it might, by possibility, have descended from a female :—It might have descended from the mother, or grandmother; the great-grandmother, or great-great-grandmother :—All these lines, therefore, shall, in their turn, succeed to the inheritance of the son, on the extinction of the line which the law first enables to succeed.

Now the son might, by possibility, have inherited the feud from his mother, his grandmother, great-grandmother, &c. as well as from his father, his grandfather, his great-grandfather, &c. but the presumption will be that it had descended in the *paternal* line. Now we can trace that line no further than the paternal grandfather, George Stiles; but *so far* we *can* trace it; and *so far* the

presumption will carry us. If then we suppose that the son took the feud by descent from Christian Smith, his paternal grandfather's mother,—this presumption that he took it by descent from his father Geoffery Stiles, and that Geoffery Stiles took it by descent from *his* father George Stiles, will be preserved; since both Geoffery and George might have taken it by descent from *her*: and, consequently, *her* brother, or the Class, No. 10. must be entitled. Whereas should we deem the feud to have descended from Cecilia Kempe, the purchaser's grandmother, and so first admit the Class, No. 11. should we not immediately contradict our first presumption,—that it had descended from the *paternal* line; *i. e.* from George Stiles, to whom we *could* have traced it, presumptively?—If, instead of considering it as descended from the purchaser's paternal grand-mother, we regard it as coming from the mother, Lucy Baker, surely we must contradict our presumption still more grossly,

since we must then exclude not only George Stiles but Geoffery also. But, as it is agreed on all sides, that the brother of Cecilia Kempe, or of the paternal grand-mother, shall take before the brother of Lucy Baker, or of the mother, (*p*) must not the brother of Christian Smith, or of the paternal great-grandmother, be preferred to Cecilia Kempe?—Will not every reason that can carry us to the line of the grand-mother, in preference to that of the mother, carry us also to that of the great-grandmother, in preference to that of the grand-mother?—And, as the purchaser, his father, and his paternal grandfather, might have taken the feud from the paternal great-grandmother, Christian Smith, while the purchaser, and his father only, could have taken it from the paternal grandmother, Cecilia Kempe, must not the chance or probability, and, consequently, the presumption, be in favour of the

(*p*) Clere & Brook. *Plowd.* 444. *Dyer.* 314. a. S. C.

former, or of the Class, No. 10?—And, if we could have traced the male paternal line higher than George Stiles, the chance or probability, and, consequently, the presumption, would, from the very nature of the thing, be proportionably encreased, according to the remoteness of the female paternal ancestor.

Again:—A wife,—as a wife,—is not an ancestor. Now, if we can trace the feud presumptively to the purchaser's paternal grandfather, George Stiles, and suppose *his* paternal line exhausted, then George Stiles must be supposed to have had the feud from *his mother*, Christian Smith, and not from his *wife*, Cecilia Kempe; since the presumption will be that *he also* had taken it by descent; and, consequently, the brother of his mother, or the Class, No. 10, must be entitled to the inheritance.

As, therefore, the law gives the preference to the heirs of the male rather than to those

of the female, and to the heirs of the mother rather than to those of the wife ;--if the feud can be traced presumptively to the paternal grandfather, must not *his* mother's heirs be first entitled, if those of his father are no longer to be found ? If we prefer the blood of the grandmother to that of the great-grandmother, do not we contradict the very axioms we set out with ? Do not we give the preference to the grandmother rather than to the grandfather ?--To the wife than to the husband ?--To the female than to male ?--Can we be said to prefer the grandfather, when we shut out *his* maternal heirs from the succession ?--If a person's blood be composed of that of *both* of his ancestors, must not his blood be considered as existing till that of *both* of his ancestors be no more ? If the blood of *the mother* (the mother of an ancestor, however remote,) continue, must it not be a continuance of the blood of the son ?--Can *his* blood be considered as exhausted, while one half of it remains ?--Can

we deem it wholly extinct when one half is not taken into consideration? (q)

From what has been advanced, therefore, it should seem to follow inevitably that the brother of the paternal great-grandmother ought to be preferred, in the succession, to the brother of the paternal grandmother.—But, before the subject be dismissed, it may be proper to consider more particularly what has been urged in favour of the contrary position.

And, in the first place, it is observable that it is not noticed by *Plowden* that Mr. Justice *Manwoode* cited any authority in support of what he advanced:—Nor is either of the other Justices noticed as having cited any:—Nor does the reporter himself, either in the case or the subjoined note, refer to any authority:—Neither does *Lord Bacon*;—

(q) *Watk. N. XVII. to. Gilb. Ten. 19. c. p. 366, &c.*

Neither does *Sir Matthew Hale*;—Neither does the *Chief-Baron Gilbert* cite any.

The author of the *Remarks*, indeed, says (r) that the *Yearbook, Mich. 12. Ed. IV. 12* * might be justly cited in support of his own system:—"For the question," says he, "between *Marwoode* and Mr. Justice *Blackstone* is this:—When all the representatives of the male stock of the paternal line are extinct, who shall succeed?—The former says the heir of the *Ailes*; the latter the heir of the *Befailes*; but, what is most singular, to support his (Mr. Justice *Blackstone's*) argument, an authority is brought which, upon the same question, gives the succession to the *Ailes*:—"The heir of the son, on the part of the *Ailes*, ought to inherit."

Now it should be observed that there is not one word in this case in the *Year-*

(r) *First Pamphlet. 39.*

* *Fol. 14. a.*

book (s) which says that the heir of the *Ailes* should exclude the heir of the *Besfailes*;—but only that the heir of the *Ailes* should take, and not the heir of the mother; which is not disputed.—Could the issue have been supposed to have left an heir on the part of the *Besfailes*, no intimation is given in the case that such heir should not have succeeded in preference to the heir on the part of the *Ailes*. This case, there-

(s) *Nota q. fuit ten. p. tous les Justic. de Comen Bank, q. lou bome p. chaf. terre & devy sans issue & sans heir de pt. le pere, q. son procbein heir de pt. le mere ava. le terr. & si boe. p. chaf. tr. & ad issue & devy, l'issue ent. & devy sans issue, & sans heir de pt. s. pier. s. de pt. aile s. pere, q. en cest case l'heir de pt. le mer. s. pere. s. de pt. son aielles doit enberit, car cesty q. doit enberit. al pere doit enberiter al fits.—Fuit [auxy.] ten. si bome purch. terr. & ad issue, q. ad le terr. per disc. & puis l'issue devy sans issue & sans heir de part le pere, q. l'heir de pt. le mere le fits ne doit enberiter, car il n'est de sank cestuy en q. l'original possess. commence. s. il n'est de sank le pere, &c. mes l'heir le fits de part l'aielles, s. de part le mere son pere doit enberit, &c.*

fore, does not appear to be a case which might be justly cited in support of the position that the brother of the paternal *Ailes* ought to be preferred to the brother of the paternal *Besfailes*.

Seeing then that there is no authority referred to which can establish the position, it remains only to examine into the reasons alleged in its support.

Mr. Justice *Manwoode* says (*t*) that the brother or sister of the purchaser's paternal grand-mother shall be preferred before the brother or sister of the purchaser's paternal great-grandmother, BECAUSE *they are equally worthy in blood* (for such heirs come from the blood of the female sex, from which the purchaser's father issued); *and, where they are all equally worthy, the next of blood shall always be preferred as heir.*

(*t*) *Plowd.* 450.

And *Plowden*, in his note, when speaking of his putting the question to *Manwoode*, in the presence of *Harper J.* asserts the reason to be--“ Because the former (*i. e.* the brother of the paternal grand-mother) is *nearer in blood* to the purchaser on the part of his father ; which proximity holds place on the part of females conjoined by marriage to males, where such blood is once derived by a male to the first purchaser.”

Lord *Bacon* (*u*) says, If a man purchase land in fee-simple, and die without issue, in the first degree the law respecteth dignity of sex and not proximity ; and, therefore, the remote heir, on the part of the father, shall have it before the near heir on the part of the mother ;—but, in any degree paramount the first, the law respecteth not [What ? (*u. u.*)] and, there-

(*u*) *Elements*. I. p. 3. *Tracts*. 37. Ed. 1737.

(*u u*) If dignity of sex, the position is indisputably erroneous ; and if dignity of blood, then there must

fore, the near heir by the grand-mother, on the part of the father, shall have it before the remote heir of the grand-father, on the part of the father.

Lord *Hale*, though he acknowledges that the brother of the father's grand-mother and the brother of the father's great-grand-mother are of the blood of the father,--and that the great-grand-mother's blood has passed through more males of the father's blood than the grandmother's, yet says (*w*) The father's mother's sister shall be preferred before the father's grandmother's, or the purchaser's great-grand-mother's brother, BECAUSE they are all *Cognati*, and not *Agnati*; and the father's mother's sister is the *nearest*; and, *therefore*, shall have the preference.

be dignity of blood to respect; and, consequently, there must be an inequality of dignity; and, if there be an inequality of dignity, the rule of proximity cannot apply; as it can only apply where the dignity is *equal*.

(*w*) *Com. Law.* 271--2.

Chief-Baron Gilbert, after noticing the preference given to the paternal line,--says, (x.) "If the father's male line failed, it [the feud] went to the female blood of the father; for the Lords were presumed rather to respect the female blood of their former tenants than the blood of the mother, who was newly introduced into the family of such their feudary: Because the feud was given *as an ancient one*: and, by consequence, the blood of the precedent tenant was preferred to any other. But the blood of the father's mother was preferred to the blood of his grand-mother, being both female bloods; and both coming under the consideration of ancient tenants, the nearer tenant's blood was preferred to the more remote."

In short, the rule assumed appears to be this—"Where the dignity is equal, there the proximity shall prevail." And, consequently, the first thing to be en-

(x) *Ten.* 19.

quired into is, Whether, in the present case, the dignity of the blood of the paternal grand-mother and that of the paternal great-grand-mother *be* absolutely equal.

The brother of the paternal grand-mother and the brother of the paternal great-grand-mother claim, it is true, as the heir of a female; and, *so far*, they may be considered as equal in dignity:—but the former, in making out his title to the first purchaser, can only claim through Geoffery Stiles, the father; whereas the latter can claim through George Stiles also:—He, therefore, derives his title through more males of the paternal line; (*y*) and, consequently, should seem the more worthy.

And, as the equality of dignity may be thus questioned, so the proximity itself may be doubted as applicable to the pre-

(*y*) See *Plowd.* 451 *Note*.—*Hales' Com. Law.* 271--2.
—and 2 *Bl. Comm.* 238--9.

sent case. For, though the son be the first purchaser, yet he takes his feud *ut antiquum*; and, consequently, as such feud is supposed of indefinite antiquity, and as we can trace it, in presumption, up to his paternal grand-father, we must prove that his paternal grand-father's blood be exhausted, before we can have recourse to any other blood;—and, consequently, according to principles already noticed, and acknowledged by Lord *Hale*, Lord *Coke*, &c.—as the paternal grand-father was composed of *two* bloods,—those of his father and his mother;—and, as his *father's* is extinct, his heir (and, by consequence, the heir of the grand-son) must remain in the blood of *his* (the grand-father's) *mother*;—as one of his bloods *is* exhausted, and the other *not* exhausted: and if the other be *not* exhausted, his blood cannot be extinct;—and if his blood be *not* extinct,—in that other blood must his heir be found:—and, consequently, the brother of the paternal grand-father's mother must be *nearer* to the paternal grand-

father, at least, than the brother of a woman whose blood (as such) could possibly form no part of his. And it can be no answer to this mode of argument to say that the grand-son was *seized*, (z) since, though it is admitted—that the grand-son took as first purchaser, yet he took the feud as a feud OF INDEFINITE ANTIQUITY; and, consequently, as a feud which is *presumed* to have descended from the father and grand-father,—and, consequently, which must be considered as having actually descended from them, while any of their blood (and their *mothers*, respectively, *were* of their blood (*)) be remaining;—for otherwise there is no meaning in the terms.

And as to the reasoning of the *Lord Chief-Baron Gilbert*, it does not appear satisfactory: For if the Lords were pre-

(z) See *Hale's Com. Law.* 269.

(*) See *Hale* 271—2. *Co. Litt.* 12 a & b. &c.

fumed to respect the female blood of their former tenants rather than the blood of the mother who was newly introduced into the family of their feudary,—and the blood of the precedent tenant was preferred to any other,—it should seem to follow that the more remote tenant's blood should have been preferred to the nearer,—rather than that the nearer should have been preferred to the more remote.

And as to *Lord Bacon's* doctrine it seems equally unsatisfactory, and, by far, more unintelligible. — And when it is considered that the author of *the Remarks* (a) observes that one at least of the positions of his Lordship “ is totally repugnant to the spirit of those laws whence the doctrine of descent originates,”—and that “ it has been contradicted by every writer on the subject, and is, therefore, inadmissible,”—any further observation on

(a) *First Pamphlet*. 31. 33.

the passage cited would surely be deemed unnecessary.

But, even granting that the blood of the paternal grand-mother and the blood of the paternal great-grand-mother are equal in dignity,—and that the proximity is in favour of the former, yet the application of the rule—“That where the dignity is equal the proximity shall prevail”—may be, at least, questionable in the present instance.

Now it is acknowledged by the author of the *Remarks* (b) that proximity can only prevail where the dignity is equal:—and he cites from Mr. *Justice Blackstone* (c) that “the object of the common law is proximity merely: *not indeed* AN ABSOLUTE PROXIMITY, *but a* PROXIMITY SUB MODO.”—And he goes on with saying, “On these

(b) *First Pamphlet*. 30.

(c) *First Pamphlet*. 11—12.

two principles, *dignity of blood* and *proximity of blood*, do the laws of inheritance depend. *The FIRST of them IS ABSOLUTE, and operates on ALL occasions;—the SECOND admits of SOME MODIFICATION, whereby it differs from the strict idea of proximity.*” For, in some instances, says he, “the term by legal construction is used in a sense different from its common acceptation:—for a term of science”, he adds, “is not to be taken in its absolute sense, but as modified by the science which adopts it.”

If then the proximity which is the object of the law be not an absolute proximity, but a proximity *SUB MODO*;—if that proximity will admit of *ANY modification*; ought not the rule of proximity to be so *modified* as to render it compatible with the existence of axioms which have been never denied? Or ought we to sacrifice to this rule, rules which were never questi-

oned, or deductions which seem inevitably and indisputably to flow from those rules? If the brother of the paternal grand-mother is to be preferred to the brother of the paternal great-grand-mother, merely in compliance with this rule of proximity—What is to become of the rules—That the preference is due to the paternal line;—That a *feudum novum* is to be held *ut antiquum*;—That a person's blood is composed of that of *both* of his ancestors?—And what is to become of that principle of common-sense which teaches us that *The* WHOLE CANNOT BE EXHAUSTED WHILE ONE HALF OF IT REMAINS?



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